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IN THE

Supreme Court of the United States

October Term, 1968

No. 461

FRIEDA SUFFIN,

Petitioner,

—versus—

THE PENNSYLVANIA RAILROAD COMPANY, THE PENNSYLVANIA COMPANY and NORFOLK AND WESTERN RAILWAY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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THE PENNSYLVANIA RAILROAD COMPANY, THE PENNSYLVANIA COMPANY and NORFOLK AND WESTERN RAILROAD COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Frieda Suffin, the plaintiff-appellant below, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit. The judgment is dated and was entered June 6, 1968 (App. 8a).

Opinions Below

The opinion of the District Court for the District of Delaware is reported at 276 F. Supp. 549. The opinion of the Third Circuit has not yet been reported (App. 4a).

Jurisdiction

The District Court's jurisdiction was based on diversity of citizenship and jurisdictional amount, 28 USC § 1332. This Court's jurisdiction is based on 28 USC § 1254(1).

Questions Presented

1. Does an Interstate Commerce Commission order under § 20a of the Interstate Commerce Act approving a railroad

carrier's issuance of securities to its parent as being "in the public interest," but which does not purport to adjudge its justness and reasonableness, deprive the District Courts of jurisdiction to award damages to the carrier for the parent's breach of its fiduciary duty in giving inadequate consideration for the securities?

2. Is it not contrary to the requirements of due process under the Fifth Amendment of the Constitution to apply § 20a in such fashion as to deprive the carrier's stockholders of relief when they were not given notice of the hearing of the proposed securities issuance?

Constitutional Provisions and Statutes Involved

The Fifth Amendment of the Constitution and §§ 5(2)(b) and 20a(2) of the Interstate Commerce Act (the "Act") are involved in this case. (App. 1a-3a).

Statement

The Complaint* (App. Below, 3a).

Plaintiff is a shareholder of defendant Norfolk and Western Railway Company ("N&W") and was a shareholder at the times of the wrongs alleged. She brings this action derivatively on behalf of N&W alleging that its controlling parents, defendants The Pennsylvania Railroad Company and its wholly-owned subsidiary, The Pennsylvania Company, breached their fiduciary duties to N&W. (For simplicity, these two defendants will be referred to collectively

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* Citations to the Appendix to this Petition are referred to as "App."; citations to the Appendix in the Court of Appeals are referred to as "App. Below".

as "Pennsylvania".) Pennsylvania owned, at the relevant time, some 2,342,784 shares of N&W's common stock; such holding constituted about one-third of N&W's outstanding shares. Pennsylvania controlled and dominated N&W through this stock ownership and interlocking directors.

By a decision of June 24, 1964 (324 ICC 1), the ICC approved N&W's acquisition of five other railroads through merger, purchase and lease. Among the conditions imposed by the ICC was that Pennsylvania divest itself of its N&W stock within ten years.

On September 22, 1964, before accepting the divestitute condition and while Pennsylvania still controlled and dominated N&W, Pennsylvania entered into an agreement with N&W that is at the heart of this lawsuit. The agreement was not submitted to the ICC for its approval as part of the merger proceedings. Under it, Pennsylvania agreed to sell 300,000 of its N&W shares, in ten annual installments, to N&W itself. In payment, Pennsylvania caused N&W to agree to issue to itself (Pennsylvania) $130 principal amount of N&W's fifteen-year 4⅝% convertible debentures (the "Debentures"). The Debentures are convertible into N&W common stock at the rate of one N&W share per $130 principal amount of the Debentures.* On the date of this transaction, N&W's common stock traded on the New York Stock Exchange at $130 per share.**

The essence of the complaint is that this agreement was wholly one-sided in favor of the fiduciary, Pennsylvania, to

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* In keeping with the divestiture requirement of the ICC, the conversion privilege is exercisable by anyone other than Pennsylvania.

** The range of N&W's stock on September 22, 1964 was 129¼-131¼; it closed at 131¼.

the disadvantage of the cestui que trust, N&W. The fiduciary could not lose. If the price of the stock increased from its then market price of $130 per share, the Debentures (being convertible at the rate of $130 per share) would rise in value and Pennsylvania would obtain the benefit because it could sell the Debentures at a premium reflecting the market advance. If, on the other hand, N&W's stock fell below $130 per share, Pennsylvania would not stand the loss because it could hold the fifteen-year Debentures (which bore the then prevailing rate of interest) and receive the full $130 principal amount at maturity. Such a heads-I-win-tails-you-lose bargain could not—and did not—result from arm's length bargaining between N&W and its controlling fiduciary, Pennsylvania, but was the product of Pennsylvania's domination and control over N&W.* By way of relief, plaintiff seeks damages, on behalf of N&W, from Pennsylvania.**

The Interstate Commerce Act

The relevant sections of the Act are §§ 5(2)(b) and 20a (2). (These sections are set forth in Appendix A, pp. 1a-3a).

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* The Court of Appeals' opinion questions Pennsylvania's control over N&W because the Pennsylvania directors resigned from the N&W board on September 16, 1964, whereas the challenged agreement is dated "as of September 22, 1964". We submit that plaintiff's allegation that Pennsylvania controlled and dominated N&W must be taken as true for the purposes of this Petition. Pennsylvania still owned its one-third stock interest in and controlled N&W as of September 22, 1964. The challenged transaction was formulated and agreed to while Pennsylvania's nominees were still serving on the N&W board (Complaint, App. Below 3a).

** Although the complaint originally also sought injunctive relief, plaintiff abandoned that prayer and announced that she was seeking damages only.

§ 5(2)(b) governs the issuance of securities in mergers. It provides:

> "* * * the Commission shall afford reasonable opportunity for interested parties to be heard. * * * If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be *just and reasonable,* the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the *public interest,* it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with modifications, so found to be *just and reasonable* * * *" (Emphasis added)

Thus, § 5(a)(b) of the Act provides that the issuance of all securities in merger proceedings are pre-conditioned on two ICC findings: (1) the transaction must be "just and reasonable" with respect to the private rights of the security holders; and (2) it must be in the "public interest." To protect the private rights of "interested parties", § 5(2)(b) provides for their right to be heard.

§ 20a(2) of the Act, on the other hand, governs the issuance of securities otherwise than in a merger. It requires that a carrier must obtain ICC approval before it can issue securities. Unlike § 5(2)(b), however, approval under § 20 does not require a finding that the transaction be "just and reasonable". All that is required is that the proposed securities issue be "compatible with the public interest" so that the carrier "will not be impaired [in] its ability to perform" its service to the public. § 20a(2) provides:

> "The commission shall make such order [authorizing a carrier to issue securities] only if it finds that such issue . . .: (a) is for some lawful object within

> its [the carrier's] corporate purposes, and compatible with the *public interest,* which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the *public* as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose." (Emphasis and parenthetical interpolations added).

Since private rights of security holders are not involved under § 20, and since no finding of the fairness and reasonableness of the transaction is required—or even permitted—to be made by the ICC, no provision is made under § 20 giving security holders or other interested parties any right to be heard.

The ICC Decisions

On June 24, 1964, the ICC acting pursuant to § 5 of the Act which governs mergers, approved N&W's acquisition of five other railroads (324 ICC 1).* As previously noted, that decision (the "Merger Decision") required that Pennsylvania divest itself of its N&W stock (324 ICC at 33, 34). But the Merger Decision did not and could not have constituted pre-approval by the ICC of the N&W Debenture issue as just and reasonable; indeed, the Debenture transaction was not even submitted to the Commission during the merger proceedings. On October 16, 1964, Pennsylvania, having agreed to divest itself of N&W stock, the merger between N&W and five other railroads became effective.

On April 13, 1966, almost two years after the Merger Decision, and a year and a half after the N&W merger had

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* *Norfolk and Western Railway Company and New York, Chicago and St. Louis Railway Company—Merger, etc.,* Finance Docket No. 21510.

been consummated, the ICC, acting *pursuant to § 20a of the Act,* which governs the issuance by carriers of securities outside of a merger, approved N&W's application (filed in February 1966) to issue the Debentures to Pennsylvania (The "Securities Decision", 328 ICC 884).*

In approving the transaction the ICC was careful, pursuant to the mandate of § 20, to limit itself to a finding that the deal was in the public interest. The Commission refrained from making any finding that the transaction was just or reasonable, and refrained, too, from affecting or purporting to affect the private rights and the relationships of N&W and its shareholders.

Defendants' Motions

Defendants moved, without answering, to dismiss the action on the ground that §§ 5 and 20 of the Act give exclusive jurisdiction over the subject matter of this litigation to the ICC and that the ICC exercised that jurisdiction by its Merger Decision (324 ICC 1) and Securities Decision (328 ICC 884).

The Decisions Below

The District Court sharply points up the nub of the controversy, thus:

> "Plaintiff further argues that the stockholder's suit is impliedly authorized by the language of the Interstate Commerce Act. She relies upon the difference in language between 49 U.S.C.A. § 5(2) (b) and 49 U.S.C.A. § 20a(2). While conceding that under § 5, the merger provision of the Act, the Interstate

* *Norfolk & Western Railway Company Securities,* Finance Docket No. 24039.

> Commerce Commission has the exclusive authority and obligation to determine whether the terms of the proposed merger are 'just and reasonable' to the private interests affected by the merger, plaintiff points to the lack of any comparable language in § 20a(2), the securities provision of the Act, and from this draws the negative inference that private interests are not and can not be determined in a § 20 proceeding." (276 F. Supp at p. 552)

The Court concludes:

> "Plaintiff's contention places an unwarranted and unnatural strain upon the construction of the Act." (276 F. Supp at p. 553)

In support of its conclusion, the Court establishes this novel interpretation of § 20:

> " . . . the Commission may approve a merger and concurrently authorize a railroad to issue securities.
>
> In (such cases), the plenary and exclusive jurisdiction of the ICC to determine whether the terms of a merger are 'just and reasonable' to the private interests involved is extended to include any securities which are issued appurtenant to a railroad merger." (paranthetical interpolation added; 276 F. Supp at p. 553)

With regard to this last proposition two observations need to be made. First, while the Commission in its 1964 Merger Decision mandated that Pennsylvania divest itself of its stock at N&W, it "did not", as the District Court correctly held, "specifically indicate the manner in which the divestiture was to be effected." (276 F. Supp. at p. 551) The question of whether N&W would turn out to be a buyer of its own stock at all, and if so on what terms, was never

considered, let alone passed upon, by the Commission in its Merger Decision in 1964.

Secondly, even assuming that the Commission might, in the exercise of its administrative discretion, have telescoped and integrated §§ 5 and 20, the fact is that it did *not* do so. For the Commission was at pains to point out that it was considering N&W's issuance of Debentures not under § 5 but under § 20—and under § 20 alone. (328 ICC 884).

Consistent with its explicit statement that it was not concerned with the private rights of N&W vis-a-vis its shareholders, the Commission confined its conclusion to a holding merely that the N&W Debenture issue was not repugnant to the public interest.

Thus the District Court imputed to the Commission the exercise of a jurisdiction which the Commission itself refused to exercise.

The syllogism of the Courts below which implies that the Commission might have approved the N&W debenture issue as fair and reasonable under § 5 involves a totally fallacious premise. The fact that the Commission mandated that Pennsylvania divest itself of its N&W stockholders does not constitute a blank check pre-approval of any transaction, no matter how wicked, that Pennsylvania might perpetrate on the puppet directors of its dominated subsidiary, N&W. The 1964 Merger Decision is satisfied, and is exhausted, by the required divestiture of Pennsylvania. The question of the justness and reasonableness of the Debenture issue is wholly unrelated—except historically—to the divestiture mandate; like all securities issues it falls within § 20.

In any case, the end result of the decisions below is that in the face of a flagrant breach of fiduciary duty the Commission never adjudicated or purported to adjudicate the justness and reasonableness, i.e., the fairness, of the Debenture deal. The Court below likewise never adjudicated the fairness of the deal. Nevertheless, plaintiff is now in the ludicrous posture of being estopped from questioning a non-existent finding.

From a precedental point of view, this interpretation of § 20 subverts a consistent line of autho ty that in securities issues (outside of those approved in mergers) the courts and the courts alone have jurisdiction over the private interests and the private rights of security holders vis-a-vis their corporations.

Since the ICC's authorization under § 20 to issue the N&W debentures did not, and could not, affect the internal or private rights of N&W and its stockholders, no notice was required to be given to interested parties of the impending hearing seeking approval to issue the Debentures as in the public interest. No notice was in fact given. No stockholder of N&W appeared at the hearing. Oblique and uninformative references to the necessity of securing ICC approval, without informing the shareholders of when, where and what for such hearings would be held is, as we shall later argue, a far cry from the notice required by due process.

Plaintiff appealed from the decision of the District Court. The Court of Appeals for the Third Circuit affirmed the dismissal substantially on the basis of the District Court's opinion. The Court of Appeals misread the ICC's Securities Decision. The Court's opinion relies on the "ex-

plicit ICC finding that the exchange 'is in the best interest of tne * * * security holders', 328 ICC at 891" (App. p. 6a). What the ICC said, however, was that the *idea* of an exchange would be beneficial to N&W's shareholders because it would "minimize the impact of [Pennsylvania's] divestiture program on the market price of [N&W's] common stock" (328 ICC 891). The ICC studiously refrained from adjudging the fairness of the particular Debenture issue here involved.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Decision of a Federal Question is in Conflict with Applicable Decisions of this Court.

A. The Court of Appeals Decision Concerning § 20a of the Interstate Commerce Act Conflicts with the Applicable Decisions of this Court.

The decisions in this Court—and elsewhere—have been virtually unanimous that private rights are not and cannot be decided by the ICC when it authorizes a carrier to issue securities solely pursuant to § 20a of the Act.

In *New York Central Sec. Corp.* v. *United States,* 287 U.S. 12, 28-9 (1932), this Court specifically held that minority stockholders seeking relief for a violation of fiduciary duties could not appeal the ICC's ruling pursuant to § 20a because the ICC had no jurisdiction under that section to hear private claims. This Court held that claims concerning breaches of fiduciary duty were cognizable only in the District Courts. This Court cited its prior decision in *Pittsburgh & W. Va. R. Co.* v. *United States,* 281 U.S. 479, 488 (1930). In that case, this Court held specifically that ICC action permitting

the sale of a passenger station in no way foreclosed a stockholder of the railroad from asserting that the sale was for an inadequate price and was, therefore, a violation of the directors' fiduciary duty. Indeed, when a stockholder sought to challenge the railroads' acts before the ICC, he was told by this Court:

> "Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the district court."

In *Otis & Co.* v. *Pennsylvania R. Co.*, 61 F. Supp. 905 (E. D. Pa., 1945), aff'd on opinion below, 155 F. 2d 522 (3rd Cir., 1946), the Third Circuit itself specifically ruled that approval by the ICC pursuant to § 20a to issue securities did not in any way preclude a derivative suit in the District Court for a breach of a fiduciary duty based, precisely, on the issuance of the securities that the ICC had approved pursuant to § 20a. Judge Kolodner in that case held (61 F. Supp. at 909):

> "The Commission, under the statutory authority here involved * * * 49 U.S.C.A. §20a, does not determine private rights."

The Court in *Otis* relied on this Court's decision in the Pitts*burgh* and *New York Central Sec. Corp.* cases as authority; and it cited, too, *Casey* v. *Woodruff*, 49 N. Y. S. 2d 625 (Sup. Ct., N. Y. Co., 1944) in which Judge Shientag held:

> "To hold that the decision of the commission on an application under §20a may be res adjudicata on the question of a director's breach of fiduciary duty would have most unfortunate effects." (49 N.Y.S. 2d at 640).

> "It [the ICC] did not, however, purport to pass upon the personal liability of the directors for alleged breach of fiduciary duty, nor did it have the slightest basis of jurisdiction for the purpose." (49 N.Y.S. 2d at 642).

Against these authorities, defendants have argued that *Denver & Rio Grande W. R. Co.* v. *U. S.*, 387 U.S. 485 (1967) and *Schwabacher* v. *U.S.*, 334 U.S. 182 (198) have, in effect, overruled the *Pittsburgh* and *New York Central Sec. Corp.* cases *sub silentio*. The Courts below agreed. We submit, however, that neither of the cases is applicable and that the *Pittsburgh* and *New York Central Sec. Corp.* cases are still controlling.

Schwabacher was a merger case which was decided pursuant to § 5 (2) (b) of the Act. The ICC was, therefore, specifically charged with the duty of seeing to it that the terms of the merger were "just and reasonable". Hearings were held at which every party was represented. It is acknowledged, of course, that an ICC decision based on a § 5 hearing cannot be collaterally attacked in the District Courts. The Securities Decision at bar (328 ICC 884), however, involved no merger and no adversary hearing; the merger between N&W and five other railroads had already been concluded some year and a half earlier.

The other authority relied on by defendants and the Courts below—the *Denver & Rio Grande* case—involved the "public interest" clause of § 20a. The issue in the *Denver & Rio Grande* case concerned the anti-competitive effect of a proposed securities issuance pursuant to § 20a; this Court held that the ICC must hold a hearing to weigh the anti-trust effect of such an issuance. This Court neither said nor implied that private rights could be decided by the ICC pursuant to § 20a.

We submit, therefore, that neither *Schwabacher* nor *Denver & Rio Grande* overruled or purported to overrule this Court's prior—and controlling—decisions in *Pittsburgh & W. Va. R. Co.* v. *United States,* 281 U. S. 479 (1930) and *New York Central Sec. Corp.* v. *United States,* 287 U. S. 12 (1932). Indeed, in *County of Marin* v. *United States,* 356 U. S. 412 (1958), this Court held that § 5 proceedings are strictly limited to merger transactions. In *Marin,* the ICC assumed § 5 jurisdiction to preside over the terms of separation between two carriers. This Court reversed the ICC's assumption of § 5 jurisdiction because the transaction involved not a merger, but its opposite, a split-up. At bar, the debenture transaction between N&W and Pennsylvania involved, like *Marin,* a separation, not a merger. Therefore, the ICC could not have exercised § 5 jurisdiction over the challenged N&W—Pennsylvania exchange even had it wanted to. *A fortiori,* the ICC's § 20a proceeding cannot be given the *res judicata* effect reserved for § 5 hearings. By holding otherwise, the Courts below rendered a decision that not only conflicts with the Act, conflicts with the applicable decisions of this Court, but conflicts, as we proceed to show, with the due process clause of the Fifth Amendment.

B. The Circuit Court's Decision Conflicts with the Fifth Amendment to the Constitution.

In the face of the destruction of the property rights of the 63,000 shareholders of N&W by the presumed action of the Commission, we argued that there was a lack of due process: the shareholders of N&W would have been entitled

to notice and an opportunity to be heard. The Court of Appeals purports to find such "notice."

> "Although the N&W proxy of March 23, 1966 gave relatively short notice of the pending application to the I.C.C. for approval of the exchange of stock for debentures, the N&W proxy of April 2, 1965, gave the appellant ample notice that a debenture-for-stock purchase agreement was being prepared as part of the divestiture necessary to accomplish the merger. The essential terms and characteristics of the transaction were set forth and an aggrieved shareholder was on notice that such a transaction was to be submitted to the I.C.C. for approval at a future date." (Opinion, App. 7a, fn. 4)

An analysis of these so-called notices establishes a novel precedent in the law of due process.

The "relatively short notice" adverted to by the Court of Appeals consists of an N&W proxy statement (App. Below, p. 19a). It was dated March 23, 1966. As part of a lengthy narrative there appears a statement in passing at page 30 that N&W's application was then pending before the ICC. The decision approving the application as being in the public interest was announced by the ICC on April 13, 1966. This "notice" never informed N&W's shareholders whether their private rights were under consideration by the Commission, whether they had a right to be heard, what the procedures were for the exercise of such rights, in short the conventional things which go into the usual form of notification especially to laymen. Even assuming that a hypothetically sophisticated reader of proxy statements made careful inquiry, he would have learned that the Commission was acting, according to its own declaration, not under § 5

but under § 20; and that, therefore, the issue of fairness and reasonableness of the transaction was not before it.

Altogether, this "notice" to the N&W shareholders was like telling a blind man to look in the dark for a black hat that isn't there.

The other "notice" cited by the Court of Appeals is even further removed from reality (App. Below, p. 16a). That consisted of an N&W proxy statement dated April 2, 1965, a year before N&W filed pursuant to § 20. That merely announced the fact that, at some undetermined future time, N&W planned to issue the Debentures "subject to the approval and authorization" of the ICC. Presumably, the interested shareholders of N&W were required to inquire at regular intervals of the ICC as to whether such application had been filed.

The minimal requirement of administrative due process is that the notice must specify the "time, place and nature of the hearing" (Administrative Procedure Act § 554).

The authorities in this Court and in the courts below are unanimous that administrative agencies are governed by the Due Process Clause of the Fifth (or Fourteenth) Amendment and cannot deprive a person of his rights or property without notice and a hearing. In *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292, 304-305 (1937), this Court held:

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional

restraints. *West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 1), *supra,* 294 U. S. p. 70; *West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 2), 294 U. S. 79; *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" (*St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73) of a fair and open hearing be maintained in its integrity. *Morgan* v. *United States,* 298 U. S. 468, 480, 481; *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U. S. 88, *supra.* The right to such a hearing is one of 'the rudiments of fair play' (*Chicago, M. & St. P. Ry. Co.* v. *Polt,* 232 U. S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 1), (No. 2), 294 U. S. 63, *supra; Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, 682. Cf. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, *supra.* There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

Accord: *Morgan* v. *United States,* 304 U. S. 1, 19 (1938) (Department of Agriculture); *Standard Airlines* v. *Civil Aeronautics Board,* 177 F. 2d 18, 21 (Dist. Col Cir., 1949); *Salvino* v. *United States,* 119 F. Supp. 277, 284 (W. D. Wash., 1954). (A three-judge court ruled that an ICC order violated due process because it permitted "no opportunity for plaintiff to be heard"); *Takeo Tandano* v. *Manney,* 160 F. 2d 665, (9th Cir., 1947).

To permit such oblique, casual and uninformative references to constitute the legally required notice of the imminent destruction of valuable property rights is to make a mockery of due process, one of the most jealously guarded requirements of the Constitution.

The Importance of the Circuit Court's Decision

The Circuit Court's decision is of great importance for many reasons.

1. The Circuit Court's decision permits fiduciaries, acting pursuant to § 20a of the Act, to deal unfairly with their *cestui que trust* with impunity. Carriers are constantly seeking ICC approval, under § 20a, for the issuance of a great variety of securities for a great variety of purposes. The Circuit Court's opinion—for the first time and in the face of the directly contrary opinions of this Court—grants immunity to directors if the ICC in a non-adversary § 20a proceeding approves the issuance.

2. The most obvious area of importance of the Circuit Court's decision is that it binds parties who had no notice of the "hearing" that compromised their rights. The authorities (cited above) are unanimous in declaring such a procedure to be in violation of the Due Process clause of the Fifth Amendment.

CONCLUSION

For the reasons given, petitioner respectfully prays that the writ be granted.

Respectfully submitted

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